Supreme Court, U.S.
FILED

(1)

No. _____ 95 177 JUL 28 1995

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

TYRONE BROOKS, LANETT STANLEY, BILLY MCKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHALE ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY-YOUNG CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY JOHNSON, REV. G. L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH ENGRAM GRANT, HENRY COOK, ANNIE SMITH, and ERCEL BALDWIN,

Appellants,

v.

STATE OF GEORGIA,

Appellees.

On Appeal From The United States District Court
For The District Of Columbia
(Three Judge Court)

JURISDICTIONAL STATEMENT AND APPENDIX

LAUGHLIN MCDONALD
Counsel of Record
MARY WYCKOFF
NEIL BRADLEY
MAHA ZAKI
American Civil Liberties
Union Foundation, Inc.
44 Forsyth Street, N.W.
Suite 202
Atlanta, Georgia 30303
(404) 523-2721

BRENDA WRIGHT
SAMUEL L. WALTERS
Lawyer's Committee for
Civil Rights Under Law
1450 G Street, N.W.
Washington, DC 20005
(202) 662-8600

Counsel for Appellants

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

57pp

QUESTIONS PRESENTED

1. Whether, given the failure of the United States to appeal the decision of the three judge court granting preclearance under Section 5 of the Voting Rights Act to a state's proposed voting changes, the court erred in denying a motion by minority voters for leave to intervene for purposes of pursuing an appeal, where the minority voters had previously sought leave to intervene prior to trial, were allowed to participate as *amici*, and were directly affected by the changes?

2. Whether in preclearing state statutes creating new superior court judgeships the district court erred in refusing to consider whether the pre-existing method of electing the judges was infected with a racially discriminatory purpose?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 2

A. The Proceedings Below 2

B. Statement of the Facts 4

1. The Majority Vote Requirement 5

2. Discrimination in Georgia 11

3. Racial Bloc Voting 13

C. The Decision of the Three Judge Court 14

The Questions Are Substantial 15

I. The Court Erred in Denying Intervention 15

II. The Existing Method of Electing Judges Is Infected with a Racially Discriminatory Purpose 18

Conclusion 24

Appendix

District Court Order, February 3, 1995 .....App. 1

District Court Order, April 4, 1995 .....App. 20

Notice of Appeal .....App. 22

42 U.S.C. § 1973 .....App. 24

42 U.S.C. § 1973c .....App. 25

TABLE OF AUTHORITIES

Page

CASES:

Allen v. State Board of Elections, 393 U.S. 544 (1969) 21

Beer v. United States, 425 U.S. 130 (1976) 14, 20, 22, 23

Brooks v. Miller, Civ. No. 1:90-CV-1001-RCF (N.D.Ga. July 17, 1990) 6

Brooks v. State Board of Elections, 775 F.Supp. 1470 (S.D.Ga. 1989), *aff'd*, 498 U.S. 916 (1990)...2, 3, 5, 16, 18

Brooks v. Georgia State Board of Elections, 790 F.Supp. 1156 (S.D.Ga. 1992) 3

Bryant v. Yellen, 447 U.S. 352 (1980) 15, 17

Busbee v. Smith, 549 F.Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1982)..... 11

City of Lockhart v. United States, 460 U.S. 125 (1983) 22, 23

City of Port Arthur v. United States, 459 U.S. 159 (1982) 18

City of Richmond v. United States, 422 U.S. 358 (1975) 19, 20

City of Rome v. United States, 446 U.S. 156 (1980) 18

Coleman v. Miller, 307 U.S. 433 (1939) 17

Diamond v. Charles, 476 U.S. 54 (1986) 17

Dillard v. Crenshaw County, 640 F.Supp. 1347, 649 F.Supp. 289 (M.D.Ala 1986), *affirmed in part, remanded in part*, 831 F.2d 246 (11th Cir. 1987)..... 21

Gray v. Sanders, 372 U.S. 368 (1963) 6, 11

Holmes v. Danner, 191 F.Supp. 394 (M.D.Ga. 1961) 13

TABLE OF AUTHORITIES – Continued

Page

Hunter v. Underwood, 471 U.S. 222 (1985) 20

Johnson v. Miller, 864 F.Supp. 1354 (S.D.Ga. 1994), *aff'd sub nom.* Miller v. Johnson, 63 U.S.L.W. 4726 (1995) 11

McCain v. Lybrand, 465 U.S. 236 (1984) 23

Newport News, etc. v. Peninsula Shipbuilders, 646 F.2d 117 (4th Cir. 1981) 17

Rogers v. Lodge, 458 U.S. 613 (1982) 11, 19

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 11

Toombs v. Fortson, 205 F.Supp. 248 (N.D.Ga. 1962) 12

Trbovich v. United Mine Workers, 404 U.S. 528 (1972) 18

United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) 15, 16

United States v. Georgia, Civ. No. 1:90-CV-1749-RCF (N.D.Ga.) 6

United States v. Hays, 63 U.S.L.W. 4679 (1995) 17

United States v. Supervisors of Warren County, 429 U.S. 642 (1977) 23

Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977) 21

White v. Regester, 412 U.S. 755 (1973) 18

Wilson v. Kelley, 294 F.Supp. 1005 (N.D.Ga. 1968) 13

Yniquez v. State of Arizona, 939 F.2d 727 (9th Cir. 1991) 17

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS:

Article III of the Constitution of the United States 17

Fourteenth Amendment of the Constitution of the United States 19, 20

28 U.S.C. § 2101(b) 2

42 U.S.C. § 1973 2

42 U.S.C. § 1973c 2

Ga. Const. art. VI 2

Ga. Code Ann. title 15 2

OTHER AUTHORITIES:

McDonald, Binford, and Johnson, "Georgia," in Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990 (eds. Davidson and Grofman, 1994) 13

Rule 24, F.R.C.P. 4, 15, 16, 17

Wright, Miller & Cooper, Fed. Prac. & Proc. Jurisdiction 2d § 3902.1 15

No. _____

In The

Supreme Court of the United States

October Term, 1995

TYRONE BROOKS, LANETT STANLEY, BILLY MCKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHALE ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY-YOUNG CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY JOHNSON, REV. G. L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH ENGRAM GRANT, HENRY COOK, ANNIE SMITH, and ERCEL BALDWIN,

v. *Appellants,*

STATE OF GEORGIA,

Appellees.

On Appeal From The United States District Court For The District Of Columbia (Three Judge Court)

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The judgment of the three judge district court granting preclearance to the State of Georgia's creation of 62 elective judgeships entered on February 3, 1995 is reported at 881 F.Supp. 7 and appears in the appendix hereto at App. 1. The order of the district court denying appellants' motion to intervene as parties defendant entered on April 4, 1995 is unreported and appears at App. 20.

JURISDICTION

The judgment and order of the three judge court was entered on February 3, 1995. Appellants' motion to intervene as parties defendant for purposes of appeal was filed on March 6, 1995, and was denied on April 4, 1995. Appellants filed their notice of appeal on June 1, 1995. *See* App. 22. This appeal is being docketed in this Court within 60 days after filing of the notice of appeal in the district court. The jurisdiction of this Court is invoked under 28 U.S.C. § 2101(b).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in the case are Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973 and 1973c, the pertinent texts of which are set out at App. 24-7.

STATEMENT OF THE CASE

A. The Proceedings Below. The State of Georgia brought this action in the District Court for the District of Columbia seeking preclearance of 62 statutes enacted during March 1967 to April 1992 creating or extending 62 new superior court judgeships. App. 3, 6. The superior court is the state's trial court of general jurisdiction. Ga. Const. art. VI; Ga. Code Ann. title 15. In a prior related case a three judge court for the Southern District of Georgia ruled that the statutes at issue were subject to preclearance. *Brooks v. State Board of Elections* ["*Brooks*"],

775 F.Supp. 1470, 1477-80 (S.D.Ga. 1989), *aff'd*, 498 U.S. 916 (1990). After an administrative submission, the Attorney General objected to the voting changes under Section 5. *Brooks v. Georgia State Board of Elections*, 790 F.Supp. 1156, 1158 (S.D.Ga. 1992). This litigation followed.

Appellants are black citizens and registered voters of Georgia, and are the plaintiffs in *Brooks*. In *Brooks*, they challenged the state's failure to secure preclearance for the disputed judgeships under Section 5 as well as the method of electing judges under Section 2 of the Voting Rights Act. *Brooks v. State Board of Elections, supra*, 775 F.Supp. at 1472. Appellants' Section 2 claim is pending in the local district court.

Some of the appellants are also members of the Georgia General Assembly and have introduced or supported legislation to abolish the existing method of electing superior court judges in favor of alternative methods such as subdistricts or limited voting. DT, Holmes at 3-4; U.S. Exs. 69, 169 (Vol. II), 80, 126.[1] Appellants have been the principal advocates of a change in the method of electing superior court judges in Georgia to provide blacks an equal opportunity to elect candidates of their choice.

Appellants sought leave to intervene in this action prior to trial but were allowed to participate only as *amici*. Intervention was denied on the ground that appellants' interests were adequately represented by the

---

[1] The three judge court required the direct testimony to be presented in written form, with the witnesses being subject to cross-examination at trial. The direct testimony is denoted "DT" and trial testimony is denoted "T."

Attorney General of the United States who was the party defendant. Both in their motion to intervene and at trial as *amici* appellants urged the court, as did the United States, to deny Section 5 preclearance to the state's submissions.

On February 3, 1995, following a bench trial, the three judge court in a 2-1 decision granted declaratory judgment for the State of Georgia. On the 30th day after the decision, March 6, 1995, appellants filed a Motion to Intervene as Parties Defendant for Purposes of Appeal pursuant to Rule 24(a)(2) and (b)(2), F.R.C.P., together with a notice of appeal to this Court. On the same day, the United States filed a notice of appeal from the February 3, 1995 order granting preclearance. On April 4, 1995 the three judge court denied appellants' motion to intervene on the ground that in light of the notice of appeal filed by the United States it lacked jurisdiction over the motion. App. 20-1.

On June 1, 1995 appellants filed a notice of appeal to this Court from the judgment of the three judge court entered on April 4, 1995 denying their motion to intervene as parties defendant for purposes of appeal. The United States filed a motion to dismiss its appeal on June 5, 1995, the last date on which its jurisdictional statement would have been timely.

B. Statement of the Facts. There are 46 judicial circuits in Georgia of varying size and population. Each circuit contains one or more counties and a specific number of superior court judges. Blacks are 27% of the total population and 25% of the voting age population of Georgia. Pl.Ex. 89. Each of the state's judicial circuits has a majority white voting age population. Pl.Ex. 90.

Judges of the superior court are elected circuitwide in non-partisan contests to four year terms. A majority vote requirement is in effect. In multi-judge circuits, candidates are required to run for specific numbered posts. Elections are held at the same time as the statewide primary. The winners are placed on the general election ballot where they run unopposed, except for write-in candidates. App. 4 and n.2.

The statutes at issue in this case added from one to six judges to 30 different circuits over a 25 year period. Forty-eight of the new judgeships were implemented without preclearance. Pl.Ex. 1. The implementation of 14 of the judgeships was enjoined in *Brooks*.

The first black to serve as a superior court judge was Horace Ward who was appointed to the Atlanta Circuit in 1977. T, Katz at 205; Pl.Ex. 83. At the time of trial, there were more than 140 superior court judges, of whom eight were black. Seven of the eight were initially appointed to office. Pl.Exs. 1, 83. No black has ever served as a superior court judge in 40 of the state's 46 circuits. DT, Katz at Tab 9; T, Katz at 213-6. Despite strong support from black voters, no black has ever been elected to the superior court outside Fulton County in an open-seat contest or a contest against a white incumbent. DT, Lichtman I at 14-5; Pl.Ex. 83. No black has ever served on the superior court outside of the Atlanta Circuit without first having been appointed to that position. Pl.Ex. 83.

1. The Majority Vote Requirement. There was a substantial amount of evidence presented at trial, which the district court refused to consider, that the majority vote requirement pursuant to which judges are elected

was adopted with a racially discriminatory purpose.[2] A statewide majority vote requirement (H.B. 117) for local, state, and federal elections, including judicial elections, was first introduced into the general assembly in 1963 by Rep. Denmark Groover. At that time, local Democratic party executive committees determined whether elections would be by majority or plurality vote, with both methods being about equally used. DT, Kousser at 4-5.

Groover was widely quoted in the press as saying that a majority vote requirement was needed to prevent "Negroes and other minorities" or "Negro bloc voting" from controlling the outcome of elections. DT, Kousser at 67. On the floor of the house, he made the same racially based arguments in favor of passage of the bill, claiming that it would reduce the influence of "the Negro bloc vote." *Id.*, at 9, 72-3. Groover also argued that a majority vote requirement would restore the "protection" which had been removed with the invalidation of the county unit system in *Gray v. Sanders*, 372 U.S. 368 (1963), a method of nomination in the primary elections which gave controlling power to sparsely populated rural counties and restricted the voting strength of blacks in the urban areas of the state. *Id.*

---

[2] Two challenges to the majority vote requirement are presently pending in the District Court for the Northern District of Georgia, Brooks v. Miller, Civ. No. 1:90-CV-1001-RCF (N.D.Ga.), and United States v. Georgia, Civ. No. 1:90-CV-1749-RCF (N.D.Ga.). In Brooks v. Miller the court denied plaintiffs' motion for a preliminary injunction against further use of the majority vote rule on the grounds that the motion had been filed on the eve of the 1990 elections and was untimely. Order, July 17, 1990.

James Mackay, a member of the house in 1963 and a former member of the U.S. Congress from Georgia, confirmed that Groover made open appeals to race in urging members of the house to support the majority vote bill. According to Mackay, "Mr. Groover gets up and says . . . we have got to go to the majority vote because . . . the Negroes and the pressure groups and special interests are going to manipulate this State and take charge if we don't go for majority vote." T at 513-4. Mackay testified that the majority vote provision would not have passed the house except for its potential to dilute the voting strength of black voters. DT at 3-4.

After passage in the house by a vote of 133 to 41, the bill was sent to the senate. The Senate Rules Committee initially voted a "do not pass" resolution. DT, Kousser at 72. In an effort to revive the bill, Groover appeared before the committee and once again made open racial appeals in urging consideration and passage of the majority vote requirement. He advised the committee that the federal government had "interceded to increase the registration of Negro voters," and that a majority vote rule would "prevent the election by plurality vote of a candidate supported only by . . . a bloc vote group." *Id.*, at 73. The committee withdrew its resolution, but the bill did not come to the floor during the remaining two weeks of the legislative session.

The Election Law Study Committee (ELSC), an advisory body authorized by the legislature in 1963 to propose a recodification of the state's election laws, included a majority vote provision in a proposed new code it drafted in the fall of 1963. U.S. Ex. 169, Minutes, ELSC, October 15-6, 1963. In preparing the initial draft of the

code, the ELSC used the Pennsylvania election code as its "guide." U.S. Ex. 169, Minutes, ELSC, August 27, 1963. The Pennsylvania code, however, contained a plurality – not a majority – vote requirement. DT, Kousser at 75.

There was evidence of racial purpose in the general deliberations of the ELSC. During the time it approved the majority vote requirement, the committee voted to remove the state's existing literacy test for voter registration but to prohibit all assistance to voters, except for those who were physically disabled. U.S. Ex. 169, Minutes, ELSC, October 15-6, 1963.

Ben Fortson, at that time Georgia's Secretary of State and a member of the ELSC, explained in a letter to the probate judge of Burke County, who had complained that repeal of the literacy test would "throw the flood gates wide open to the ignorant and uninformed," that the purpose of the proposal was to preempt a federal court challenge to the literacy test and "attempt to try to set up something that would help us protect ourselves . . . I would not be for the proposal at all if the penalties attached [for assisting voters] would not result in an honest election honestly counted and if it would not prevent block-voting by any group." DT, Kousser at 54.

Eugene Cook, the state's Attorney General and another member of the ELSC, was an initial supporter of the attempt to recast the literacy test into a supposedly more acceptable form. He changed his vote, however, because "[i]t was our thought originally that this gesture would insulate us against federal court suits . . . Upon further study, however, I perceive that it takes no great degree of sophistication to discern that this is a mere play

on words." DT, Kousser at 79. Both Fortson and Cook supported the literacy test drafted in 1957 by an earlier ELSC, of which they were members, and which was enacted by the general assembly in 1958. *Id.*, at 56-8.

The new election code was considered by the legislature during a special two month session in 1964. The majority vote requirement, which was identical in substance with Groover's H.B. 117 that had been approved by the house, passed both the senate and house with no separate roll call on the measure. DT, Kousser at 4-5.

Leroy Johnson, the first black elected to the state legislature since Reconstruction, testified that "[t]here is no question in my mind that Denmark Groover's 1963 bill was a direct precedent for the statewide majority vote requirement adopted as part of the election code in 1964." DT, Johnson at 6; T, Johnson at 649, 668-9. According to Senator Johnson,

> many white members of the General Assembly favored adoption of a statewide majority vote requirement as a method of diluting minority voting strength. This purpose was evident among some of my colleagues in the state senate, but it was particularly true in the house . . . Many of them had been advocates of the county unit system and resented its abolition by the federal courts. They saw the runoff system as a way of minimizing the effects of increased black voter registration.

DT, Johnson at 7-8.

The general assembly not only adopted the majority vote requirement in 1964, but at the same time it re-

enacted the discriminatory literacy test as well. The senate, on motion by Senator Johnson, voted to reduce the number of questions asked of residents seeking to register based on their "good character and understanding" as an alternative to literacy from 30 to six. The house voted to adopt a test containing 20 questions, but raised the grade necessary to pass from 67% to 75% correct answers. The house version was adopted by the general assembly. Milton Carlton, the senate floor leader and a witness for the state, conceded that the 1964 election law carried forward the racially discriminatory effect of the existing literacy test. DT, Carlton at 39-40.

More than 50 of the 60 statutes creating additional judgeships incorporated by express reference the at-large, majority vote and designated post method of elections provided by state law. Pl.Exs. 21-4, 27-30, 32-62, 65-70, 72-4, 76-82. While the majority vote requirement has not resulted in the defeat of a black judicial candidate who won in the primary only to lose in the runoff, blacks have been defeated for other offices by operation of the state's majority vote requirement. Of the 192 black/white runoffs for county office from 1970 through 1992, blacks won the primary only to lose the runoff 40 (21%) times. By contrast, blacks came in second in the primary and won the runoff only 18 (9%) times. DT, Maggiotto at 22-3, Tab 4, T, at 405-13. There was also evidence that the majority vote requirement has deterred blacks from running for judicial office. DT, Douglas at 5; DT, Brooks at 3-4; DT, Irvin at 33-4; T, Irvin at 1203-4, 1214-5.

Appellant Brooks, with the support of other black legislators, introduced legislation to repeal the majority vote rule and require only a plurality vote for nomination

or election. The legislation never made it to the floor for a vote. U.S. Exs. 126, 169 (Vol. II); DT, Holmes at 3.

The legislature did, however, pass a bill in 1994 abolishing the majority vote requirement for general elections and substituting a 45% plurality vote requirement. The bill was enacted following the defeat of Democratic incumbent U.S. Senator Wyche Fowler in a general election runoff by Republican challenger Paul Coverdell. The purpose of the bill was widely acknowledged to be to prevent future Republican runoff victories in the general election. DT, Irvin at 17-8, 22-6, 38; T, Irvin at 1195, 1197, 1209. The Attorney General objected to the bill under Section 5 on the ground that the state failed to meet its burden of proving the absence of discriminatory purpose in not applying the plurality requirement to partisan primaries and judicial elections. U.S. Exs. 112, 119, 214.

2. **Discrimination in Georgia**. The state has a long history of discrimination in all areas of life, particularly in voting, which has been detailed in numerous decisions of the federal courts. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966); *Rogers v. Lodge*, 458 U.S. 613, 624 (1982); *Gray v. Sanders, supra*, 372 U.S. at 376-81; *Busbee v. Smith*, 549 F.Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1982). In *Johnson v. Miller*, 864 F.Supp. 1354, 1379 (S.D.Ga. 1994), *aff'd sub nom. Miller v. Johnson*, 63 U.S.L.W. 4726 (1995), the three judge court took judicial notice that "[f]rom the state's first Constitution – which barred blacks from voting altogether – through recent times, the state has employed various means of destroying or diluting black voting strength." *Id.*, slip op., Statement of Judicial Notice.

The 1960s, during which the majority vote requirement was enacted, were a time of particular racial ferment in Georgia. In 1962 the general assembly met in special session to comply with the decision in *Toombs v. Fortson*, 205 F.Supp. 248 (N.D.Ga. 1962), and redistrict the senate. Despite the fact that the state constitution mandated single member districts, the legislature passed a law requiring the at-large election of senators in counties which were entitled to more than one senator. DT, Kousser at 63. The reason for requiring at-large elections was to insure that no black would be elected from a single member district in one of the populous urban counties of the state. DT, Kousser at 65.

Frank Twitty, house floor leader and one of the chief spokesmen for the at-large requirement, repeatedly urged his colleagues to support the measure because without countywide elections a black would almost certainly be elected to the senate from Fulton County. DT, Kousser at 65. Those active in politics understood that due to the prevalence of racial bloc voting in the state at-large elections made it more difficult for blacks to win public office. DT, Johnson at 3.

A lawsuit challenging the at-large provision was filed in state court, and the judge ruled that the state constitution required single member districts for all senate seats. DT, Kousser at 65. Leroy Johnson ran for a single member senate seat in Fulton County and was elected. DT, Johnson at 4.

Between 1974 and 1990 vote dilution lawsuits were filed against 40 cities and 57 counties in the state challenging their systems of at-large elections. McDonald,

Binford, and Johnson, "Georgia," in *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990* 81 (eds. Davidson and Grofman, 1994). All but one of the cities, and 53 of the counties, changed to district systems containing majority black districts as a result of the litigation. *Id.* at 100.

Through the mid-1960s no public or private institutions in Georgia would admit blacks into law school. State law required schools to be racially segregated, and provided for the cut-off of state funds to any school which admitted blacks. Ga. Laws 1956, pp. 756-64. DT, Johnson at 1; DT, Hollowell at 1-2; DT, Engstrom at 9, para. 18; *Holmes v. Danner*, 191 F.Supp. 394 (M.D.Ga. 1961).

Successful lawsuits challenging the systematic exclusion of blacks from jury service were brought in numerous judicial circuits including Alcovy, Atlanta, Atlantic, Augusta, Chattahoochee, Coweta, Dougherty, Flint, Macon, Middle, Northern, Ocmulgee, Ogeechee, Pataula, South Georgia, Southwestern, Tifton, Toombs, and Waycross. DT, Hollowell at 7. Racial segregation in prisons and jails was not abandoned until the practice was declared unconstitutional in *Wilson v. Kelley*, 294 F.Supp. 1005 (N.D.Ga. 1968).

3. **Racial Bloc Voting**. Substantial evidence was introduced – also ignored by the district court – of racial bloc voting and political cohesion. In 12 black/white elections for superior court in the circuits at issue, the average rate of black support for black candidates was 80% and the average rate of white support for white candidates was 74%. DT, Lichtman I at 10 and Table 1. In

more than 400 statewide, Congressional, countywide, and other judicial elections participated in by the voters of the counties within each circuit (so-called exogenous elections) there was a pattern of strong black voter cohesion with at least 70% of blacks supporting black candidates more than 80% of the time. DT, Lichtman I at 12, Appendices I and II.

Black candidates were defeated in 7 of the 10 open-seat and white incumbent contests from 1968 to 1994. T, Maggiotto at 376-7; DT, Lichtman III at 6. Recent judicial elections in Georgia have been characterized by racial campaign appeals. DT, Benham at 7-8; DT, Cooper at 8.

C. The Decision of the Three Judge Court. The three judge court ruled in a 2-1 decision that the disputed judgeships were created to compensate for increased caseload and not for any racially discriminatory purpose, and that neither the decision to add new judgeships nor the method of electing the judges circuitwide by majority vote were "retrogressive." App. 7, 12.[3] In reaching this conclusion, the court refused to consider whether the majority vote requirement, pursuant to which the new judges were elected, was enacted with a discriminatory purpose because it "was in force on November 1, 1964, the Act's effective date." App. 18.[4]

---

[3] The United States conceded that the creation of additional judgeships was "not retrogressive with respect to minority voting strength, as that term has been construed by the Supreme Court in *Beer v. United States*." App. 11-2.

[4] The court also refused to consider whether the method of electing the additional judges circuitwide pursuant to majority vote and numbered post requirements resulted in discrimination within

Judge Johnson dissented. She reserved the right to file a dissenting opinion, but has not done so. App. 2-3.

THE QUESTIONS ARE SUBSTANTIAL

I. The Court Erred in Denying Intervention

Both this Court and lower federal courts have allowed post-judgment intervention by non-parties for purposes of pursuing an appeal. *Bryant v. Yeilen*, 447 U.S. 352, 366-7 (1980) (allowing intervention for purposes of appeal after the plaintiffs declined to appeal from an adverse decision); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395 n.16 (1977) (allowing intervention and approving a line of cases allowing post-judgment intervention for purposes of appeal); Wright, Miller & Cooper, *Fed. Prac. & Proc. Jurisdiction 2d* § 3902.1 ("[m]any cases establish that intervention can be sought in the district court for the purpose of appealing a judgment that has an adverse effect on the intervenor").

Appellants satisfy the requirements for intervention for purposes of appeal. Rule 24(a), F.R.C.P., grants the right to intervene when: (1) the application is timely; (2) the movant asserts an interest in the subject of the action; (3) the interest may be impaired by disposition of the action; and, (4) the interest is not adequately represented by the existing parties. Rule 24(b) allows permissive

---

the meaning of Section 2 on the ground that Congress did not intend for Section 2 standards to apply to Section 5 preclearance. App. 13. The correctness of that ruling is not an issue presented in this appeal.

intervention when the application is timely and the movant's claims or defenses and the main action have a question of law or fact in common.

The motion to intervene was filed within the time for filing a notice of appeal by a party and was therefore timely. *See United Airlines, Inc. v. McDonald, supra,* 432 U.S. at 396 (motion by non-party to intervene for the purpose of appealing is timely if filed "within the time period in which the named plaintiffs could have taken an appeal"). Appellants have asserted a number of interests in the subject matter of the action which satisfy Rule 24. As black citizens and registered voters of Georgia whose voting rights are adversely affected by the expansion of the superior court judiciary under an at-large, majority vote, numbered post voting structure, appellants have a claim or interest in the outcome of this lawsuit. In addition, their claims and the main action have both questions of law and fact in common, *e.g.*, whether the existing method of elections results in discrimination or is infected with a racially discriminatory purpose in violation of Section 5, as well as Section 2 of the Voting Rights Act.

Appellants are also plaintiffs in a lawsuit filed in the Southern District of Georgia challenging the existing method of electing superior court judges on vote dilution grounds under Sections 2 and 5. *Brooks v. State Board of Elections, supra.* But for *Brooks,* this action would never have been brought. As plaintiffs in *Brooks,* and as *amici* in this case, appellants are suffering particularized injury from the order they seek to reverse that would be avoided if their appeal succeeds. Their special interest in this litigation, which is substantially more than "only a

generalized grievance against allegedly illegal governmental conduct," *United States v. Hays*, 63 U.S.L.W. 4679, 4681 (1995), satisfies Rule 24, as well as any applicable standing or case or controversy requirements of Article III. *Diamond v. Charles*, 476 U.S. 54, 68-70 (1986); *Bryant v. Yellen, supra*, 447 U.S. at 368; *Yniquez v. State of Arizona*, 939 F.2d 727, 733 (9th Cir. 1991) (citizens group and its spokesperson who had sponsored and campaigned for a ballot initiative had an "added interest" that conferred standing to intervene for purposes of appeal); *Newport News, etc. v. Peninsula Shipbuilders*, 646 F.2d 117, 123 (4th Cir. 1981) (a district court's rejection of an *amicus's* contentions gives it an appealable interest).

Some of the appellants, as discussed above, are members of the state legislature and have sought to change the existing method of judicial elections. They have a particularized interest in the subject of the litigation for purposes of Rule 24(a), and a sufficient stake in the outcome to satisfy independently the standing and case or controversy requirement of Article III of the Constitution. *See Coleman v. Miller*, 307 U.S. 433, 438 (1939) (state senators who voted against ratification of a federal constitutional amendment had standing to challenge the authority of the state lieutenant governor to cast the deciding vote in favor of the amendment).

The outcome of this appeal may as a legal and practical matter impair or impede appellants' ability to protect their interests. While Section 5 preclearance does not preclude a Section 2 challenge to the judgeships, the burden of proof, which is on the submitting jurisdiction under Section 5, shifts to plaintiffs in a Section 2 proceeding. Moreover, the state will doubtlessly argue that a

presumption of validity attaches after an election system receives judicial preclearance. Conversely, a reversal of the order of the district court would likely result in a resolution of the entire litigation, and avoid the necessity of proceeding in *Brooks* under Section 2.

At the time of the district court's order denying intervention, appellants' interests were ostensibly being represented by the United States. Now that the United States has dismissed its appeal, appellants' interests are not being represented *at all* on appeal. As a general matter, the burden of showing inadequate representation "should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). No representation on appeal constitutes inadequate representation as a matter of law.

II. The Existing Method of Electing Judges Is Infected with a Racially Discriminatory Purpose

As a general matter, this Court has frequently noted the tendency of a majority vote requirement to contribute to minority vote dilution in jurisdictions where voting is racially polarized. *White v. Regester*, 412 U.S. 755, 766 (1973) (a majority vote requirement enhances "the opportunity for racial discrimination"); *City of Port Arthur v. United States*, 459 U.S. 159, 167 (1982) ("[i]n the context of racial bloc voting . . . the rule would permanently foreclose a black candidate from being elected to an at-large seat"). More specifically as relates to Georgia, in *City of Rome v. United States*, 446 U.S. 156, 183-4 (1980), the Court denied Section 5 preclearance to a number of voting changes proposed by Rome, Georgia in part because a

1966 change to a majority vote requirement "significantly decreased" the electoral opportunities of blacks. And in *Rogers v. Lodge, supra,* 458 U.S. at 627, the Court struck down at-large elections in Burke County, Georgia as being intentionally discriminatory in violation of the Fourteenth Amendment in part because the 1964 statewide majority vote requirement – the same provision involved in this appeal – operated "to submerge the will of the minority" and "deny the minority access to the system."

In this case, unlike in *Rogers v. Lodge, supra,* there is no need to infer racial purpose in the use of the challenged method of elections from the *effect* or operation of the majority vote requirement. Here, the evidence of purposeful discrimination was direct and undeniable. There was proof that the majority vote requirement was enacted intentionally to dilute minority voting strength.[5] The method of electing the additional superior court judges utilizing the majority vote requirement is therefore the product of intentional discrimination and for that reason violates the "purpose" prong of Section 5. *City of Richmond v. United States,* 422 U.S. 358, 378-9 (1975) (a voting change motivated by race "is forbidden by Section 5").

---

[5] As noted *supra,* there was also substantial evidence of historical discrimination and the political reality surrounding enactment of the majority vote requirement which corroborate the more direct evidence of discrimination. Rogers v. Lodge, *supra,* 458 U.S. at 625 ("[e]vidence of historical discrimination is relevant to drawing an inference of purposeful discrimination").

The use of the majority vote requirement in the election of judges also violates the Fourteenth Amendment since the statute was enacted with an "impermissible racial motivation." *Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (invalidating an Alabama felon disfranchisement law enacted in part with a discriminatory purpose). The unconstitutionality of the existing system furnishes an independent basis for denial of preclearance, for as the Court held in *Beer v. United States*, 425 U.S. 130, 141 (1976), a voting practice would be objectionable under Section 5 without regard to its retrogressive effect if it "so discriminates on the basis of race or color as to violate the Constitution."

Because Section 5 contains both a purpose and an effect standard, proof that a discriminatory purpose was a motivating factor in the decisionmaking process precludes a voting change from being precleared, regardless of the actual effect of the change. *City of Richmond v. United States, supra*, 422 U.S. at 378-9 (Section 5 prohibits use of a purposefully discriminatory voting change "whatever its actual effect may have been or may be"). A contrary rule, *i.e.*, requiring effect evidence in every case, would render the purpose prong of Section 5 meaningless. To the extent that some evidence of discriminatory effect is required to establish a constitutional violation, *Hunter v. Underwood, supra*, 471 U.S. at 232, there was strong evidence in this case of racial bloc voting, and the discriminatory effect of the majority vote requirement on the outcome of elections and in discouraging blacks from running for office.

A party opposing preclearance need not prove that a discriminatory purpose was the sole factor motivating the

decision of the legislature. As the Court explained in a related context in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 265-6 (1977), "racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." There is even greater reason for application of this rule in proceedings under Section 5, where the submitting jurisdiction has the burden of proof. *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

This case is analogous to *Dillard v. Crenshaw County*, 640 F.Supp. 1347, 649 F.Supp. 289 (M.D.Ala 1986), *affirmed in part, remanded in part*, 831 F.2d 246 (11th Cir. 1987), in which the court invalidated at-large elections in several Alabama counties under Section 2 because a pre-Voting Rights Act 1961 statewide numbered place law had been enacted with a discriminatory purpose and thus tainted the at-large systems wherever they existed in the state. The district court held that,

> regardless of the reasons for which the at-large systems were put into place in the various counties . . . the numbered place laws have inevitably tainted these systems wherever they exist in the state. In adopting the laws, the state reshaped at-large systems into more secure mechanisms for discrimination.

640 F.Supp. at 1357.

As with the designated post requirement in *Dillard*, the majority vote requirement in this case was enacted by the state in 1964 to reshape all elections, including those for superior court judges, into more secure mechanisms

for discrimination. Regardless of the reason new judges were subsequently added, their method of election is the product of intentional discrimination.

The fact that the discriminatory majority vote requirement was first enacted in 1964 does not shield its incorporation and use in new voting procedures from Section 5 review. It would be a perversion of *Beer v. United States, supra,* to hold that Section 5 prohibited review of an unconstitutional practice that was a critical feature of a voting change admittedly subject to pre-clearance merely because the unconstitutional practice was enacted prior to November 1, 1964. Nothing in the Court's Section 5 jurisprudence countenances such an anomalous result.

In *City of Lockhart v. United States,* 460 U.S. 125 (1983), the Court held that pre-Voting Rights Act practices which are continued by post-Act electoral changes are subject to Section 5 review where the new practices cannot be evaluated without considering them in light of the old. Thus, the continuation of two at-large seats and the use of numbered posts by the City of Lockhart were subject to Section 5 review in an action to preclear an increase in the size of the city's governing body and the introduction of staggered terms of office. According to the Court, "[t]he possible discriminatory purpose or effect of the new seats, admittedly subject to § 5, cannot be determined in isolation from the 'pre-existing' elements of the council."

460 U.S. at 131. For that reason, "the *entire system* introduced in the 1973 charter is subject to preclearance." *Id.* at 131-2 (emphasis added).[6]

Similarly, in *McCain v. Lybrand*, 465 U.S. 236, 255 n.27 (1984), the Court cited *Lockhart* with approval and indicated that post-Voting Rights Act changes cannot be evaluated "in an analytical vacuum," but "in the context of the entire electoral scheme." Of course, voting procedures in effect at the time of enactment of the Act which are unaffected by, and do not become an integral part of, new voting practices are not subject to review under Section 5. *Lockhart, supra*, 460 U.S. at 131 n.5, *citing and distinguishing Beer v. United States, supra*, 425 U.S. at 138-9.

The statutes creating new judgeships expressly included the circuitwide method of elections, with majority vote and numbered post requirements. The possible discriminatory purpose of the new seats cannot be determined in isolation from the pre-existing method of elections. The entire system of electing the added judges is subject to Section 5 review.[7] In light of *Lockhart* the district court should have considered the evidence of

---

[6] The changes in *Lockhart* were precleared, but, insofar as Section 5 is concerned, had they been objected to the city would merely have kept its pre-existing procedures. United States v. Supervisors of Warren County, 429 U.S. 642, 647 (1977).

[7] The three judge court conceded this point by looking at the entire system of elections, including use of "[t]he majority vote requirement" and "the circuit-wide scope of the primaries," in determining that the addition of judges was not retrogressive. App. 12. There is no basis for applying a different analysis in determining the existence of racial purpose.

purposeful discrimination in the adoption of the majority vote requirement for the election of the added judges.

The district court erred in refusing to consider whether the method of electing judges – as opposed to merely the decision to add new judgeships – was infected with a discriminatory purpose. Preclearance should have been denied.

CONCLUSION

For the above reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

LAUGHLIN MCDONALD
Counsel of Record
MARY WYCKOFF
NEIL BRADLEY
MAHA ZAKI
American Civil Liberties
Union Foundation, Inc.
44 Forsyth Street N.W. – Suite 202
Atlanta Georgia 30303
(404) 523-2721

BRENDA WRIGHT
SAMUEL L. WALTERS
Lawyer's Committee for Civil
Rights Under Law
1450 G Street, N.W.
Washington, DC 20005
(202) 662-8600

Counsel for Appellants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF GEORGIA,	)	
Plaintiff,	)	
	)	**Civil Action No.**
v.	)	**90-2065 SSH**
JANET RENO, *et al.*,	)	**(KLH, U.S.C.A.) (NHJ)**
Defendants.	)	

ORDER

(Filed Feb. 3, 1995)

Plaintiff State of Georgia brought this action seeking a declaratory judgment that 63 state statutes enacted after November 1, 1964, the effective date of the Voting Rights Act of 1965 (Act), creating or extending 62 new state superior court judgeships do not discriminate on the basis of race or color in violation of section 5 of the Act, 42 U.S.C. § 1973c. The case having been tried before the court, for the reasons stated in the accompanying Memorandum Opinion, it is

ORDERED, that judgment be entered in the plaintiff's favor and it is further

DECLARED, that the 63 statutes at issue do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.

IT IS SO ORDERED.

For the Three-Judge Court:*

/s/ Stanley S. Harris
STANLEY S. HARRIS
UNITED STATES DISTRICT JUDGE

Date: FEB. 3, 1995

---

* Judge Johnson dissents and reserves the right to file a dissenting opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF GEORGIA, Plaintiff,	)	
v.	)	Civil Action No. 90-2065 SSH (KLH, U.S.C.A.) (NHJ)
JANET RENO, *et al.*, Defendants.	)	

Before Henderson, Johnson* and Harris, JJ.

MEMORANDUM OPINION

(Filed Feb. 3, 1995)

The State of Georgia brought this declaratory judgment action under section 5 of the Voting Rights Act of 1965 (Act), 42 U.S.C. § 1973c, seeking a declaration that the Georgia legislature's creation of 62 elective superior court judgeships after November 1, 1964 "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. A bench trial was held on October 11-14, 1994, with closing argument presented on November 17, 1994.[1] On the evidence presented, the court holds that the State of Georgia is entitled to the declaration it seeks. In

* Judge Johnson dissents and reserves the right to file a dissenting opinion.

[1] By stipulation of the parties, the direct evidence was presented in documentary form and the trial was conducted before a single judge of this three-judge court. *See* Order filed Aug. 26, 1994. Closing arguments were made before the entire three-judge court.

compliance with Rule 52 of the Federal Rules of Civil Procedure, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The State of Georgia is divided into 46 judicial circuits, each of which is allocated a specific number of superior court judges who serve four-year terms. See Plaintiff's Exhibit 88, Ga. Code Ann. § 15-6-2, Ga. Const. art. 6, § 7, ¶ 1.

2. Superior court judges are elected in non-partisan, designated-post primaries by circuit-wide majority vote followed by plurality vote general elections. *See* Ga. Code Ann. §§ 21-2-135, 21-2-284.1, 21-2-501.[2] The Georgia General Assembly established the designated-post and majority vote requirements in June 1964. *See* 1964 Ga. Laws No. 26 §§ 34-1002, 34-1514 (June 24, 1964) (now codified at Ga. Code Ann. § 21-2-501).[3] By a 1966 amendment to the Georgia constitution, general elections, which had previously been state-wide, were made circuit-wide to correspond to the primaries' scope. *See* 1966 Ga. Laws No. 47. This change was cleared by the United States Attorney

---

[2] Under Georgia's election process, a candidate must garner a majority of votes cast in the circuit primary to make it to the general election. Ga. Code Ann. § 21-2-284.1. If no candidate wins a circuit-wide majority, a run-off primary is held between the two front runners. *Id.* The name of the primary winner is placed on the general election ballot along with a space for a write-in vote. *Id.* § 21-2-501.

[3] Before that time, a simple plurality was sufficient for election.

General in 1968. *See Brooks v. Georgia State Bd. of Elections*, 775 F.Supp. 1470, 1478 n.11 (S.D. Ga. 1989).

3. Despite Georgia's popular election system, a majority of superior court judges in office since 1968 – 153 of 233 – have initially come to their posts by gubernatorial appointment. Plaintiff's Exhibit 93 at 11. The Georgia Constitution provides that the governor fill any mid-term vacancy or new judicial position with his appointee who serves until the next scheduled election. Ga. Const. art. 6, § 7, ¶ 3. All Georgia governors in office since 1972 have appointed judges from a list provided by the Judicial Nominating Commission (Commission). The Commission, which consists of five gubernatorial appointees and five Georgia State Bar (Bar) ex officio members, has from the beginning followed substantially the same procedure: It (1) notifies bar members in a given jurisdiction of a court vacancy and the nomination deadline therefor, (2) accepts nominations for the vacancy from Bar members, (3) sends a letter to each nominee requesting that he complete an enclosed questionnaire and send it with other specific information to each Commission member by a set date, (4) investigates each candidate, discussing among themselves and with other Bar members each nominee's qualifications and obtaining information regarding any past disciplinary action, (5) meets to evaluate and compile, by secret ballot, a list of five nominees and (6) sends the Governor the list of nominees, along with the questionnaire each submitted and a report of the vote tally. A. Gus Cleveland, "The Judicial Nominating and Appointment Process in Georgia 1971-1990," 27 Ga. St. Bar J., Nov. 1990 at 54-59 (Exhibit A to Plaintiff's Direct Testimony of Cubbedge Snow, Jr.).

4. As of November 1, 1964, 61 superior court judgeships existed in the State of Georgia. *See* Plaintiff's Exhibit 1.

5. Since that time, 77 additional judgeships have been statutorily created, of which 62, including 14 that have never been filled,[4] have been denied clearance by the Attorney General. *See* Plaintiff's Exhibits 1, 3.

6. The 62 challenged judgeships were created by 62 separate acts during the period March 1967 to April 1992. *See* Plaintiff's Exhibits 21-77, 78-82.

7. In 1973 the Georgia General Assembly directed the Georgia Supreme Court to create the Judicial Council, *see* Ga. Code Ann. § 15-5-20, and itself established the Administrative Office of the Courts (AOC) to act as the Judicial Council's staff, Ga. Code Ann. § 15-5-22.

8. Since the creation of these two bodies, the AOC has conducted extensive studies upon which the Judicial Council has relied in making recommendations to the Georgia General Assembly regarding the creation of new judgeships. *See* Plaintiff's Direct Testimony of Robert L. Doss at 5; Plaintiff's Exhibits 4-20.

---

[4] In a related challenge to Georgia's judicial selection process brought under section 2 of the Act, a three-judge court of the Southern District of Georgia enjoined the state from filling any vacant challenged posts but granted Georgia leave to retain judges in the already filled posts until March 1, 1995. *See Brooks v. Georgia State Bd. of Elections*, 790 F. Supp. 1156 (S.D. Ga. 1990); *Brooks v. Georgia State Bd. of Elections*, Civil Action No. CV288-146 (filed February 28, 1994).

9. Each superior court judgeship created since 1974 has been expressly recommended by the Judicial Council based on the AOC's detailed studies of population and caseload. *See* Plaintiff's Exhibits 4-20; *see also* Plaintiff's Direct Testimony of Robert L. Doss, Assistant Director of the AOC from 1973-1975 and Director of the AOC from 1975 to the present, at 4-11 (explaining that race had "play[ed] no part whatever" in the AOC or Judicial Council's deliberations regarding new judgeships).

10. The record contains no affirmative evidence that any of the pre-Judicial Council judgeships was created for a racially discriminatory purpose and offers substantial credible evidence that those judgeships were added solely to compensate for increased caseload.

Director Doss testified that during his early research for the AOC he "learned that at least during the decade ending in 1973 recommendations of the General Assembly for additional superior court judgeships or judicial circuits were governed mainly by population considerations as they related to judicial workload," that recommendations for additional judgeships were made "by individual judges, by attorneys, or by other interested persons" to their local state legislators who then introduced appropriate legislation, and that "there was a traditional 'rule of thumb' generally followed during this time period under which new judgeships were typically proposed on the basis of approximately 50,000 persons per judge in the affected judicial circuit." *Id.* at 3-4.

Former Georgia state representative Wayne Snow, Jr., who served on the House Judiciary Committee from 1963

through 1983, described the pre-Judicial Council judgeship creation process in some detail:

> Prior to the formation of the Judicial Council in 1973, legislators who sponsored bills to enact judgeships would appear before the Judiciary Committee. The committee required sponsors to be prepared to show and demonstrate a true need. At that time, we estimated that an additional judgeship would cost in excess of $100,000.00 of State funds annually and would balance the showing of need with the available funding. Legislators would present caseload information, population trends, and other evidence they had demonstrating need.
>
> * * *
>
> At no time did anyone on the Judiciary Committee or in the legislature express that race was a reason or a factor to create or not to create a new judgeship. In no instance where a judgeship was created while I was on the Judiciary Committee was race involved in the decision to enact a judgeship. The issue was always need.
>
> At no time during my service in the General Assembly did anyone ever suggest that Georgia's judicial election system was racially discriminatory. No one ever suggested that electing judges by a majority vote requirement or by circuit-wide vote was discriminatory. In fact, the method of election was controlled by other statutes which were not part of the legislation to create new judgeships.

Plaintiff's Direct Testimony of Wayne Snow, Jr. at 2-3, 4.

The Honorable Horace T. Ward, Senior District Judge of the United States District Court for the Northern District of Georgia, who served as a Georgia state senator from 1965 until 1974, testified:

> While I was in the State Senate, I served a number of years on the Judiciary Committee. While on the Judiciary Committee and in the Senate generally, statutes were proposed and acted upon that increased the number of superior court judges in various circuits in the state. My recollection of the information and materials presented in support of legislative action increasing superior court judges or creating new circuits related to caseload, increasing population, and the like. This was the basis upon which I voted for or against such legislation. At no time, to my knowledge, was any argument or any statement made by any senator or witness that there was a racial consideration in the decision to create new judgeships or judicial circuits. The method of electing these judgeships was not an issue when the Senate acted upon this legislation.

Plaintiff's Direct Testimony of the Honorable Horace T. Ward at 2.

11. Based on the evidence and the preceding findings of fact, it is clear to the court that the 62 judgeships added between 1968 and 1992 were created for the nondiscriminatory purpose of addressing increasing caseloads in specific circuits.

CONCLUSIONS OF LAW

1. Georgia is a "covered jurisdiction" under section 5 of the Act, 30 Fed. Reg. 9897 (1965); 28 C.F.R. § 51.4; *id.* pt. 51, app.; *Brooks v. Georgia State Bd. of Elections*, 997 F.2d 857, 859 (11th Cir. 1993),[5] and must therefore obtain clearance from this court or from the United States Attorney General before implementing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. § 1973c.

2. The creation of new superior court judgeships in Georgia has been held to be a "standard, practice, or procedure with respect to voting different from that in

---

[5] A "covered jurisdiction" under section five is "a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of [title 42] based upon determinations made under the first sentence of section 1973b(b) of [title 42] are in effect." 42 U.S.C. § 1973c. The relevant prohibitions apply to any state or political subdivision "which (i) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (ii) the Plaintiff's Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964." *Id.* § 1973b(b). A "test or device" is defined as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." *Id.* § 1973b(c).

force or effect on November 1, 1964" subject to the clearance requirement because "it has a potential for discrimination." *Brooks v. Georgia State Bd. of Elections*, 775 F. Supp. 1470, 1477-80 (S.D. Ga. 1989) (citing *Dougherty County, Ga., Bd. of Educ. v. White*, 439 U.S. 32, 42 (1978)), *aff'd mem.*, 498 U.S. 916 (1990).

3. "It is well established that in a declaratory judgment action under § 5, the plaintiff State has the burden of proof." *Georgia v. United States*, 411 U.S. 526, 538 (1973) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966)).

4. Thus, it is incumbent upon Georgia to prove the absence of both discriminatory effect and discriminatory purpose in the creation of the superior court judgeships. *City of Pleasant Grove v. United States*, 429 U.S. 462, 469 (1987) (citing *City of Rome v. United States*, 446 U.S. 156, 183 n.18 (1980)).

5. Georgia has established the absence of discriminatory effect. Section 5 prohibits only changes that produce a "retrogressive" discriminatory effect, that is, changes that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976); *see also Lockhart v. United States*, 460 U.S. 125, 133 (1983) ("Section 5 was intended to halt actual retrogression in minority voting strength. . . . "). Thus, a change that "d[oes] not increase the degree of discrimination against blacks . . . [is] entitled to § 5 preclearance." *Id.* at 134 (citing *Beer*). The defendants have conceded, as they must, that Georgia's creation of

the additional judgeships is not retrogressive. *See* Defendants' Proposed Conclusion of Law No. 13 ("The voting changes occasioned by the implementation of the 62 elected judgeships at issue here are not retrogressive with respect to minority voting strength, as that term has been construed by the Supreme Court in *Beer v. United States*, 425 U.S. 130, 141 (1975) [sic]."). In fact, they have never objected to the creation of new judgeships per se – only the way in which those judgeships are filled, namely through elections that are circuit-wide and require a majority of votes cast. Yet neither of those characteristics can be deemed retrogressive. The majority vote requirement, as noted above, was already in place on the Act's effective date, while the circuit-wide scope of the primaries, although adopted after that date, was cleared by the Attorney General.[6]

Nevertheless, the defendants argue that when Congress extended the Act in 1983, after both *Beer* and *Lockhart*, it expressed an intent to incorporate section 2 of the

---

[6] The change to circuit-wide elections had, if anything, an ameliorative rather than dilutive effect on minority voting strength, replacing as it did the previous state-wide elections. The reduction in electorate size produced some circuits with a substantially higher percentage of black voters, thereby increasing the likelihood that black judges would be elected. *See Thornburg v. Gingles*, 478 U.S. 30, 55-56 (1986) (explaining that where voting is racially polarized, a high percentage of white voters may " 'minimize or cancel' black voters' ability to elect representatives of their choice.") (quoting S. Rep. No. 417, 97th Cong., 2nd Sess. 28 (1982); *cf. Beer*, 425 U.S. at 141 (concluding that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.").

Act into section 5 so that whenever a change violates section 2, clearance must be denied under section 5 regardless of retrogression.[7] No court has yet adopted the defendants' position and, given the scant support they have offered, we decline to do so.

---

[7] Section 2 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973. No showing of retrogression is required to establish a section 2 violation. *See generally Thornburg v. Gingles*, 478 U.S. 30, 42-47 (1986) (setting out requirements of section 2 vote dilution violation); *Holder v. Hall*, 114 S. Ct. 2581, 2587 (1994) ("Retrogression is not the inquiry in § 2 dilution cases.") (Kennedy, J., joined by Rehnquist, C.J.).

As Justice Kennedy recently explained, sections 2 and 5 of the Act "differ in structure, purpose, and application." *Holder v. Hall*, 114 S.Ct. 2581, 2587 (1994). One major difference is that section 5 on its face applies only to states that employed discriminatory voting schemes as of certain benchmark dates, thereby creating a voting strength "baseline" against which to measure the effect of proposed voting changes in covered jurisdictions. *See Holder*, 114 S.Ct. at 2587 (Kennedy, J., joined by Rehnquist, C.J.). As the *Beer* Court explained, in imposing and extending the admittedly extraordinary clearance requirement,[8] "Congress desired to prevent States from

---

[8] The extraordinary nature of section 5 has long been recognized. For example, in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), Justice Black, dissenting in part, expressed his conviction that "§ 5 which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that 'The United States shall guarantee to every State in this Union a Republican Form of Government' " and that "the inevitable effect of any such law which forces any one of the States to entreat federal authorities in faraway places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces."). *Id.* at 359-60; *see also Georgia v. United States*, 411 U.S. 526, 545 (Powell, J., dissenting) ("It is indeed a serious intrusion, incompatible with the basic structure of our system, for federal authorities to compel a State to submit its legislation for advance review."); *United States v. Board of Commissioners of Sheffield, Ala.*, 435 U.S. 110, 141 (1978) ("[Section 5's] so-called 'preclearance' requirement is one of the most extraordinary remedial provisions in an Act noted for its broad remedies. Even the Department of Justice has described it as a 'substantial departure . . . from ordinary concepts of our federal system'; its encroachment on state sovereignty is significant and undeniable.") (Stevens, J. joined by Burger, C.J., and Rehnquist, J., dissenting) (footnote omitted; ellipsis in opinion).

'undo[ing] or defeat[ing] the rights recently won' by Negroes," *Beer*, 425 U.S. at 140 (quoting H.R. Rep. No. 397, 91st Cong., 1st Sess. 8 (1969)) (alteration in opinion), and "to insure that [the gains thus far achieved in minority political participation] shall not be destroyed through new (discriminatory) procedures and techniques," *id.* at 140-41 (quoting S. Rep. No. 295, 94th Cong., 1st Sess. 19 (1975)) (alteration in opinion). Further, "Congress explicitly stated that 'the standard [under § 5] can only be fully satisfied by determining on the basis of the facts found by the Attorney General [or the District Court] to be true whether the ability of minority groups to participate in the political process and to elect their choices to office is *augmented, diminished, or not affected* by the change affecting voting. . . . ' " *Id.* at 141 (quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 60 (1975)) (alteration and emphasis in opinion). Thus, the *Beer* court reasoned, "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."

There is little reason to believe Congress has changed its mind since *Beer* and *Lockhart*. The defendants' sole authority for their novel argument consists of a single sentence in a Senate Judiciary Committee report footnote and their own regulation. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982) ("In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2.") (Report); 28 C.F.R. § 51.55(b)(2) ("In those instances in which the Attorney General concludes

that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2, the Attorney General shall withhold Section 5 preclearance."). In our opinion, neither shows a change in Congressional intent.

The sentence cited from the Report must be considered in context. When it extended the Act in 1982, Congress amended section 2 in reaction to and repudiation of the Supreme Court's plurality position in *Mobile v. Bolden*, 446 U.S. 55 (1980), and its progeny, to make clear that "proof of discriminatory intent is not required to establish a violation of Section 2," Report at 2, any more than it is to prevent section 5 clearance. The sentence cited by the defendants was intended merely to emphasize that proof of the requisite unlawful effect is in itself sufficient under either section, regardless of motive. We do not read the lone remark to change the nature of the effect necessary to deny section 5 clearance. That the Committee was aware of *Beer* and its retrogression holding is clear from the immediately preceding sentence. Report at 12 n.31 ("Under the rule in *Beer v. United States*, 425 U.S. 130, a voting change which is ameliorative is not objectionable unless the change 'itself so discriminates on the basis of race or color as to violate the Constitution.' 425 U.S. at 141; *see also* 142 n. 14 (citing to the dilution cases from *Fortson v. Dorsey*[, 379 U.S. 433 (1965)] through *White v. Regester*[, 412 U.S. 755 (1973)])."). Had Congress intended to overturn that holding it could have amended section 5 as it did section 2, with an explanation similar to the lengthy one on the section 2 amendment. *See* Report at

15-43. It did not. Given the Congressional inaction, the earlier legislative history supporting the retrogression requirement, set out in *Beer*, 425 U.S. at 140-41,[9] and the extensive case law applying the requirement, both before and after the 1982 amendments,[10] we decline to adopt the defendants' position based on the snippet of legislative history they have offered.

As for the DOJ regulation, it is entitled to no deference from this court where, as here, Congress has made clear its contrary intent. *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

---

[9] *See supra* Conclusion of Law 5 ¶ 3.

[10] The Supreme Court continues to construe section 5 to require retrogression, *see Shaw v. Reno*, 113 S. Ct. 2816, 2830-31 (1993) ("Under [the 'nonretrogression'] principle, a proposed voting change cannot be precleared if it will lead to 'a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise' " (*quoting Beer*, 425 U.S. at 141) (dictum), and this district has continued to impose the requirement, *see State of New York v. United States*, Civil Action No. 94-2219, slip op. at 6-8 (Dec. 22, 1994) (expressly rejecting the defendants' theory); *Texas v. United States*, 802 F. Supp. 481, 485-86 (D.D.C. 1992) ("In order to grant preclearance to a reapportionment plan a court must make two findings. First, the plan may not be retrogressive in terms of minority voting rights when compared to the plan that would be in effect were the plan in question not approved.") (citing *Beer*); *County Council of Sumter County, S.C. v. United States*, 596 F. Supp. 35, 39 (D.D.C. 1984) ("In order to rebut the inference of discriminatory effect, plaintiffs here were required to prove that the at-large election system in Summer County will not 'lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.' ") (quoting *Beer*, 425 U.S. at 140).

For the foregoing reasons, we conclude that the creation of the additional superior court judgeships has no discriminatory effect under section 5 because it is not retrogressive.

6. The additional judgeships were not established for a discriminatory purpose. This conclusion flows ineluctably from our factual findings above regarding the State of Georgia's purpose in creating new superior court judgeships and the methods employed to do so. *See supra* Findings of Fact 7-11. The defendants assert discriminatory intent can be inferred from the various statutes' reference to the existing electoral process. *See, e.g.*, Plaintiff's Exhibit 21 § 2 (election for new judgeship "shall be held and conducted in the manner hereafter provided by law for the election of judges of superior courts of this State."). We view this argument, however, simply as an attempt to circumvent the section 5 retrogression rule and thus to challenge the majority vote requirement, which was in force on November 1, 1964, the Act's effective date. Further, the evidence affirmatively shows that the majority vote requirement was not even discussed when the new judgeships were subsequently created. *See supra* Finding of Fact 10. Thus, we do not see how the statutory recitation of the cited boilerplate language, which does not even describe the specific electoral method to be used, can be construed as evidence of discriminatory intent in creating the new judgeships.

7. Plaintiff State of Georgia is entitled under section 5 of the Act to a declaration, as set out in the accompanying order, that the creation of the 62 additional judgeships since the Act's effective date "does not have the purpose and will not have the effect of denying or

abridging the right to vote on account of race or color." 42 U.S.C. § 1973c.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF GEORGIA, Plaintiff, v. JANET RENO, Attorney General of the United States, *et al.*, Defendants.	)	Civil Action No. 90-2065 (SSH) (KLH, U.S.C.A.) (NHJ)

ORDER

(Filed Apr. 4, 1995)

Before the Court is a "Motion to Intervene as Parties Defendant for Purposes of Appeal," filed by petitioners Tyrone Brooks and twenty-one others, all currently amicus curiae in this action. Also before the Court is the opposition of plaintiff State of Georgia to petitioners' motion.

This Court lacks jurisdiction over petitioners' motion. Petitioners filed the instant motion to intervene on March 6, 1995, noting that the Department of Justice had yet to file a notice of appeal in this action. The Department of Justice filed a notice of appeal that same day, twenty-four minutes after petitioners filed their motion to intervene. "[T]he filing of a valid notice of appeal from a final order of the district court divests that court of jurisdiction to act on the matters involved in the appeal, except to aid the appeal, correct clerical errors, or enforce its judgment so long as the judgment has not been stayed or superseded." *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897,

928 (5th Cir. 1983); *see also Armstrong v. Board of School Directors*, 616 F.2d 305, 327 (7th Cir. 1979); *Hobson v. Hansen*, 44 F.R.D. 18, 19 (D.D.C. 1968), *aff'd in part, rev'd in part sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1979) (district court had jurisdiction over proposed intervenors' motions only because court of appeals had remanded case to district court to hear motions).

Accordingly, since this Court lacks jurisdiction over petitioners' motion, the motion is dismissed.

SO ORDERED.

For the Three-Judge Court:

/s/ Stanley S. Harris
Stanley S. Harris
United States
District Judge

Date: APR 4 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF GEORGIA, Plaintiff,	)	
v.	)	Civil Action
JANET RENO, et al., Defendants,	)	No. 90-2065 (KLH, U.S.C.A.) (SSH) (NHJ)
TYRONE BROOKS, et al., Defendant-Intervenors.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed Jun. 1, 1995)

Notice is hereby given that Tyrone Brooks, Lanett Stanley, Billy McKinney, Joe Beasley, Venus E. Holmes, Michael Robinson, Edward Brown, Rev. Dr. William Howell, John White, Mary Young-Cummings, Mary Black, Willie Mays, William Young, Deanie Frazier, Diane Harvey Johnson, Rev. G. L. Avery, Juanita T. Williams, Patricia C. Jones, Edith Engram Grant, Henry Cook, Annie Smith, and Ercel Baldwin, hereby appeal to the Supreme Court of the United States Court pursuant to 28 U.S.C. §§ 1253 and 2101(b), and 42 U.S.C. § 1973c, from the order and judgment of the three judge court entered on April 4, 1995 denying their motion to intervene as parties defendant for purposes of appeal.

Dated: June 1, 1995.

Respectfully submitted,

/s/ Laughlin McDonald
LAUGHLIN McDONALD
MARY WYCKOFF
NEIL BRADLEY
MAHA ZAKI
American Civil Liberties
Union Foundation, Inc.
44 Forsyth Street, N.W.
Suite 202
Atlanta, Georgia 30303
(404) 523-2721

/s/ Samuel L. Walters
SAMUEL L. WALTERS
DC Bar No. 405654
Lawyer's Committee for
Civil Rights Under Law
1450 G Street, N.W.
Washington, DC 20005
(202) 662-8600

ATTORNEYS FOR APPELLANTS

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact to seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does

not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with

the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.